CasePrepPlus

September 25, 2020

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

DISCIPLINARY HEARINGS (INMATES).

SUBSTANTIAL EVIDENCE SUPPORTED THE MISBEHAVIOR REPORT ALLEGING THE INMATE WAS ISSUED A RAZOR FOR SHAVING BUT THE ROUTINE "RAZOR CHECK" INDICATED THE RAZOR WAS MISSING; THE INMATE CLAIMED HE WAS NEVER ISSUED A REPLACEMENT AND UNSUCCESSFULLY SOUGHT TO PRESENT WITNESSES TO DEMONSTRATE THE RAZOR CHECK SYSTEM IS NOT RELIABLE; THERE WAS AN EXTENSIVE DISSENT.

The Court of Appeals, over an extensive dissent, determined the hearing officer's finding the inmate was guilty of the infraction charged in the misbehavior report was supported by substantial evidence. The dissent fleshes out the facts. The misbehavior report alleged the inmate had been issued a razor (for shaving) but no razor was found in a routine "razor check" – raising the possibility that the missing razor could be used to make a weapon. The inmate claimed he had not been issued a replacement razor and sought to present witnesses to demonstrate the razor security system was unreliable (the witness-request was denied): "Substantial evidence supported the administrative determination because there was 'a rational basis for the conclusion adopted by the agency' ... . The record proof, including the inmate misbehavior report, 'razor check records,'... and contraband receipt, was adequate to permit a reasonable person to conclude that petitioner was guilty of the charged infraction. In reaching the opposite conclusion, the dissent exceeds the judicial function by impermissibly crediting testimony rejected by the agency and re-weighing the record evidence in petitioner's favor. The hearing officer did not violate petitioner's constitutional right to call witnesses, as 'implemented by the prison regulations in this State' ... . The hearing officer explained that the requested witnesses' testimony was not material and, in the circumstances presented, that conclusion was justified. Petitioner's other arguments are unpersuasive ...". ***Matter of Zielinski v. Venettozzi*, 2020 N.Y. Slip Op. 04905, CtApp 9-15-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

A JUDGMENT SUBMITTED AFTER THE 60-DAY DEADLINE IMPOSED BY 22 N.Y.C.R.R. § 202.48 (WHERE THE DECISION DIRECTS SUBMISSION OF THE JUDGMENT) CAN BE ACCEPTED BY THE COURT IN THE EXERCISE OF DISCRETION.

The Second Department determined Supreme Court properly accepted a judgment submitted after the 60-day deadline, rather than deeming the judgment abandoned: "22 NYCRR 202.48 requires, inter alia, that a judgment be submitted within 60 days after the filing of the decision directing its submission, and failure to timely submit the judgment shall be deemed an abandonment of the proceeding. However, 'it is within the sound discretion of the court to accept a belated order or judgment for settlement' ... . 'Moreover, a court should not deem an action or judgment abandoned where the result would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources' ... . Here, the Supreme Court providently exercised its discretion in accepting the petitioner's judgment despite its untimely submission, since doing so brought finality to the proceedings and preserved judicial resources ...". ***Matter of Crown Castle NG E., LLC v. Town of Hempstead*, 2020 N.Y. Slip Op. 04940, Second Dept 9-16-20**

CIVIL PROCEDURE.

ISSUE WAS NEVER JOINED, THEREFORE THE ACTION COULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE PURSUANT TO CPLR 3216.

The Second Department, reversing Supreme Court, determined the action should not have been dismissed pursuant to CPLR 3216 for failure to prosecute because issue was never joined: "CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. 'A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met' ... . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] ...). Since at least one precondition set forth in CPLR

3216 was not met, the Supreme Court was without power to issue an order conditionally dismissing the action pursuant to that statute ...". ***OneWest Bank, FSB v. Singh*, 2020 N.Y. Slip Op. 04957, Second Dept 9-16-20**

CIVIL PROCEDURE, APPEALS, JUDGES, ATTORNEYS.

THE ONLY WAY TO COMPEL A JUDGE TO SIGN A DOCUMENT TO CREATE AN APPEALABLE PAPER IS A MANDAMUS ACTION PURSUANT TO ARTICLE 78; THE FAILURE TO BRING THE ARTICLE 78 PROCEEDING PRECLUDED APPEAL IN THIS CASE; THE OPINION INCLUDES A COMPREHENSIVE EXPLANATION OF WHAT THE REQUIREMENTS OF AN APPEALABLE PAPER ARE AND SHOULD BE CONSIDERED DEFINITIVE ON THE TOPIC.

The Second Department, in a full-fledged opinion by Justice Dillon, over a concurrence, determined the plaintiffs' only option when the judge refused to sign the transcript of the oral decision (CPLR 2219) and, in the alternative, refused to sign the proposed order with notice of settlement (22 N.Y.C.R.R. § 202.48(a)), was a mandamus proceeding to compel the judge to sign. Without the judge's signature, there was no appealable paper and plaintiffs could not appeal the decision disqualifying plaintiffs' counsel. Because the four-month statute of limitations for bringing an Article 78 (mandamus) action had long passed, the plaintiffs could not bring the appeal. The opinion includes a clear and comprehensive explanation of what constitutes appealable paper pursuant to CPLR 2219 and 22 N.Y.C.R.R. § 202.48(a) which should be saved as a reference resource: "... [T]he Justice failed or refused to later sign the transcript of the proceedings, and therefore, the transcript never qualified as an order for purposes of its enforcement or for an appeal ... . While the transcript bears the signature of the court reporter who certified its truth and accuracy, the court reporter's certification does not substitute for the plain and separate obligation set forth in CPLR 2219(a) that a judge or justice sign his or her name or initials to the document (see CPLR 5512[a] ...). The absence of the Justice's signature on the transcript had the effect of preventing the plaintiffs from directly appealing the adverse determination to the Appellate Division. Likewise, the Justice failed or refused to sign the proposed order that was submitted to him, with a copy of the transcript and with notice of settlement. Such an order, if signed with or without modification of its proposed language, would have become an enforceable order and subject to appeal. Parties are entitled to orders that are both enforceable and appealable, and those fundamental rights should not be thwarted by any jurists' unwitting failure to abide by the requirements of CPLR 2219(a) ... . * * * Absent a proceeding pursuant to CPLR article 78, the plaintiffs can receive no relief on this appeal. This Court cannot compel under the guise of CPLR 2219(a) and 22 NYCRR 202.48 relief that can only be properly accomplished by mandamus, which is now untimely." ***Charalabidis v. Elnagar*, 2020 N.Y. Slip Op. 04913, Second Dept 9-16-20**

CIVIL PROCEDURE, ATTORNEYS.

LAW-OFFICE-FAILURE ALLEGATIONS WERE INSUFFICIENT; PLAINTIFF'S MOTION TO ENTER A DEFAULT JUDGMENT IN THIS PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to enter a default judgment in this pedestrian accident case should have granted. The law-office-failure allegations were deemed insufficient: "In order to successfully oppose a motion for leave to enter a default judgment, a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action ... . Here, the ... defendants' conclusory explanation that their attorney misplaced the file and that the office was understaffed was insufficient to establish a reasonable excuse for the default ... . Since the ... defendants failed to demonstrate a reasonable excuse for their default, this Court need not consider whether they proffered a potentially meritorious defense to the action ...". ***Maldonado v. Mosquera*, 2020 N.Y. Slip Op. 04934, Second Dept 9-16-20**

CIVIL PROCEDURE, ATTORNEYS, JUDGES.

APPELLANT'S REQUEST FOR AN ADJOURNMENT TO FIND NEW COUNSEL SHOULD HAVE BEEN GRANTED; THE NEARLY $800,000 JUDGMENT AGAINST THE APPELLANT REVERSED.

The Second Department, reversing Supreme Court, determined appellant's request for an adjournment to find new counsel should have been granted. The appellant's attorney had also represented other respondents and had drawn up a settlement agreement. The appellant declined to sign settlement and the court entered a judgment against the appellant for nearly $800,000: "The granting of an adjournment for any purpose rests within the sound discretion of the court ... , and its determination will not be disturbed absent an improvident exercise of that discretion ... . In deciding whether to grant an adjournment, the court must engage in a balanced consideration of numerous relevant factors, including the merit or lack of merit of the proceeding, prejudice or lack thereof to the petitioner, the number of adjournments granted, the lack of intent to deliberately default or abandon the action, and the length of the pendency of the proceeding ... . Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in denying the appellant's request for an adjournment to obtain new counsel ... . There was no prejudice to the petitioner, no lack of diligence by the appellant, and no substantial delay in the proceeding ...". ***Matter of People of State of N.Y. v. Emstar Pizza, Inc.*, 2020 N.Y. Slip Op. 04950, Second Dept 9-16-20**

CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE.

THE MOTION TO DISMISS THE BREACH OF CONTRACT CAUSE OF ACTION BASED ON DOCUMENTARY EVIDENCE DID NOT ESTABLISH A DEFENSE AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the breach of contract cause of action should not have been dismissed: "... [T]he plaintiff stated a cause of action, in effect, to recover damages for breach of contract based on an alleged breach of the implied covenant of good faith and fair dealing inherent in the parties' contract . The plaintiff alleged, in effect, that there was an implied understanding that the defendant would cooperate with the plaintiff's efforts to legally change the usage of the rental space, which would require approval by the DOB, and, therefore, the defendant's... failure to cooperate in legalizing the premises constitutes a breach of contract. 'A party seeking dismissal pursuant to CPLR 3211(a)(1) on the ground that its defense is based on documentary evidence must submit documentary evidence that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim' ... . 'In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable' ... . Here, the evidence submitted by the defendant either was not 'documentary' within the meaning of CPLR 3211(a)(1) or failed to conclusively establish a defense to the third cause of action as a matter of law ...". ***Twinkle Play Corp. v. Alimar Props., Ltd.*, 2020 N.Y. Slip Op. 04987, Second Dept 9-16-20**

CIVIL PROCEDURE, FORECLOSURE, VEHICLE AND TRAFFIC LAW.

DEFENDANT PRESENTED SUFFICIENT PROOF SHE DID NOT LIVE AT THE ADDRESS WHERE THE FORECLOSURE COMPLAINT WAS SERVED TO WARRANT A HEARING; THERE WAS NO SHOWING THAT HER FAILURE TO UPDATE HER ADDRESS WITH THE DEPARTMENT OF MOTOR VEHICLES WAS TO PREVENT SERVICE.

The Second Department, reversing Supreme Court, determined plaintiff's motion to enter a default judgment in this foreclosure action should not have been granted without first holding a hearing on defendant's claim she was never served with the complaint. The defendant presented proof, including a lease, demonstrating she did not live at the address where service was made. The fact that defendant had not updated her address with the Department of Motor Vehicles did preclude defendant from demonstrating she lived at a different address because there was no evidence of a deliberate misrepresentation to prevent service: "... [T]he defendant successfully rebutted the process servers' affidavits through her specific averments that, at the time of each purported service, neither the New York Avenue address, nor the subject premises, was her residence, actual dwelling place, or usual place of abode ... . Rather, the defendant averred that at the time of each purported service, she resided at an address on Albany Avenue in Brooklyn. The defendant annexed to her affidavit her lease for the Albany Avenue premises covering the period from January 25, 2014, through January 31, 2015, money orders made payable to the Albany Avenue landlord within the lease period, the defendant's 2015 W-2 bearing the Albany Avenue address, utility bills during the lease period bearing the Albany Avenue address, and bank statements during the lease period bearing the Albany Avenue address. These records, in conjunction with the defendant's sworn statements, are evidence that the defendant did not reside at the locations where process was served, and were sufficient to warrant a hearing ...". ***Nationstar Mtge., LLC v. Esdelle*, 2020 N.Y. Slip Op. 04956, Second Dept 9-16-20**

CIVIL PROCEDURE, JUDGES.

DEFENDANTS' FAILURE TO SERVE A CONFERENCE SCHEDULING ORDER ON PLAINTIFFS, WHICH APPARENTLY RESULTED IN THE PLAINTIFFS NOT ATTENDING THE CONFERENCE, DID NOT JUSTIFY THE DISMISSAL OF DEFENDANTS' FULLY SUBMITTED SUMMARY JUDGMENT MOTION WHICH MUST BE DECIDED ON THE MERITS.

The Second Department, reversing Supreme Court, determined the judge should not have dismissed defendants' summary judgment motion in this car accident case because defendants apparently did not serve an order scheduling a conference on the plaintiffs. Apparently the defendants appeared at the conference but the plaintiffs did not: "22 NYCRR 202.27 governs what a court may do in the event that the plaintiff, the defendant, or both parties fail to appear at a scheduled calendar call or conference. Specifically, where the plaintiff appears but the defendant does not, the court may grant judgment by default or order an inquest ... . Where the defendant appears but the plaintiff does not, the court may dismiss the action and order a severance of counterclaims or cross claims ... . If no party appears, the court may make such order as appears just ... . Here, since the defendants apparently appeared at the conference ... , but the plaintiffs did not appear, the sanction available to the Supreme Court was the dismissal of the action and the severance of any counterclaims or cross claims. Clearly, the denial of the defendants' summary judgment motion as a sanction for not serving the plaintiffs with a copy of the order ... , was not a penalty authorized under the plain language of 22 NYCRR 202.27(b). Under the circumstances of this case, where the defendants' motion was fully submitted and ready to be decided several months prior to the court's issuance of the ... order scheduling a conference, the court should not have denied the motion pursuant to 22 NYCRR 202.27 and should have decided the motion on its merits ... Indeed, even if neither party had appeared for the scheduled settlement conference, in which case the court, pursuant to 22 NYCRR 202.27(c), was authorized to make 'such order as appears just,' under the circumstances present here, it would have been an improvident exercise of discretion to sanction the defendants by denying

their fully submitted summary judgment motion without regard to an evaluation of its merit ...". ***Charalabidis v. Elnagar*, 2020 N.Y. Slip Op. 04912, Second Dept 9-16-20**

CONTRACT LAW, CORPORATION LAW, FIDUCIARY DUTY, CIVIL PROCEDURE.

CAUSES OF ACTION FOR UNJUST ENRICHMENT, BREACH OF FIDUCIARY DUTY AND AN ACCOUNTING SHOULD NOT HAVE BEEN DISMISSED; FAILURE TO TRANSFER ASSETS ALLEGED A CONTINUING WRONG AND PAYMENTS WHICH ALLEGEDLY SHOULD HAVE BEEN MADE DURING THE STATUTE OF LIMITATIONS PERIOD WERE ACTIONABLE.

The Second Department, reversing Supreme Court, determined plaintiff stated causes of action for unjust enrichment, breach of fiduciary duty and an accounting against her sister (Weisel), the sole manager of A & Z, of which plaintiff is also a member. The court noted that the allegation that Weisel did not transfer assets to A & Z alleged a continuing wrong, so payments allegedly owed to A & Z within the statute of limitations period were actionable: "To state a cause of action for unjust enrichment, the plaintiff must allege that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered ... . '[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty' ... . Here, the plaintiff has alleged that Wiesel is the sole manager of A & Z—which, if true, would impose a fiduciary duty on Wiesel arising out of her position as the sole manager of A & Z ... . The amended complaint sufficiently alleges that Wiesel is in a fiduciary relationship with the plaintiff, arising out of both her position as sole manager of A & Z and her familial relationship with the plaintiff ... . A cause of action for accounting requires 'the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest' ...". ***Greenberg v. Wiesel*, 2020 N.Y. Slip Op. 04927, Second Dept 9-16-20**

CONTRACT LAW, TRUSTS AND ESTATES, FAMILY LAW.

THE CAUSE OF ACTION SEEKING THE IMPOSITION OF A CONSTRUCTIVE TRUST TO PREVENT UNJUST ENRICHMENT SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFF WIFE ENTERED A SETTLEMENT AGREEMENT REQUIRING PAYMENTS BY HER EX-HUSBAND; AFTER HER EX-HUSBAND'S DEATH HIS CHILDREN ALLEGEDLY EMPTIED THE ESTATE OF ASSETS, THEREBY PREVENTING THE FULFILLMENT OF THE TERMS OF THE SETTLEMENT AGREEMENT.

The Second Department, reversing Supreme Court, determined the cause of action alleging the existence of a constructive trust to prevent unjust enrichment should not have been dismissed. Plaintiff and her deceased ex-husband entered a settlement agreement in which plaintiff would be entitled to certain payments until 2020 and 2023. Plaintiff's ex-husband died in 2017 and the complaint alleged that all of the ex-husband's assets had been removed from the estate by the husband's children making it impossible for the terms of the settlement to be fulfilled: "The purpose of a constructive trust is to prevent unjust enrichment ... . Accordingly, 'the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice' ... . ' A constructive trust is an equitable remedy, and may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' ... . Moreover, an agreement between spouses, such as the agreement and addendum here, involve a fiduciary relationship requiring the utmost good faith ... . Since the agreement and addendum provide that, if necessary, the plaintiff could use the assets of Iannazzo's [the ex-husband's] estate to satisfy his obligations to her, and, thereafter, all of Iannazzo's assets were transferred to the Trust before his death, his estate can provide no relief to the plaintiff and the obligations she is owed pursuant to the agreement and addendum will not be met. The plaintiff therefore adequately states a cause of action that the defendants would be unjustly enriched if the Trust is allowed to retain the portion of the assets now owned by the Trust that would satisfy the unmet obligations of Iannazzo and his estate pursuant to the agreement ...". ***Derosa v. Estate of Iannazzo*, 2020 N.Y. Slip Op. 04917, Second Dept 9-16-20**

COURT OF CLAIMS, NEGLIGENCE, MEDICAL MALPRACTICE.

CLAIMANTS' MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED PRIMARILY BECAUSE THE MEDICAL RECORDS PROVIDED THE STATE WITH TIMELY KNOWLEDGE OF THE NATURE OF THE CLAIM.

The Second Department, reversing the Court of Claims, determined claimants' motion for leave to file a late notice of claim pursuant to Court of Claims Act § 10(6) in this medical malpractice action should have been granted, primarily because the state had timely knowledge of the nature of the claim and was not prejudiced by the 14 week delay: "... [T]he claimants demonstrated that the State had timely notice of the essential facts constituting the claim, inter alia, to recover damages for personal injuries arising from the alleged malpractice, by virtue of the medical records from Southampton Hospital as well

as the medical records from Stony Brook University Hospital (hereinafter University Hospital), also owned by the State, to which the claimants' infant son was transferred and where he later died ... . The medical records evidence the medical care received by the claimant and the infant. The records show that during the claimant's labor, no sonogram of the fetus was taken to determine the fetus' head size. The records also show that, after approximately nine hours of unsuccessful labor at Southampton Hospital, which included the administration of pitocin, a birth-facilitating drug, and an epidural, the claimant was counseled about using forceps to deliver the fetus. After the claimant agreed to try a forceps-assisted delivery and declined to consent to an episiotomy, the infant was delivered via forceps-assistance and was diagnosed immediately with a hemorrhage below his scalp as a result of 'birth trauma.' Thereafter, the infant was transferred to University Hospital, where he died a week later. The autopsy report in University Hospital's medical records indicates that the infant suffered, inter alia, an injury during the forceps-assisted delivery which separated the infant's brain stem from his upper cervical spinal cord region, and the infant's overly large head was noted to be a factor in this injury. Although the treating physician noted in his report—which was created after the delivery—that the claimant did not want a cesarean section, the claimant's medical record contains a form signed by the claimant on admission consenting to a cesarean section. There is no documentation in the record to show that the claimant was advised that a cesarean section should be performed. In addition, the claimant's medical records, postdelivery, demonstrate that she experienced perineal lacerations and vaginal tears, which were deep and penetrated the perirectal tissue, as a result of the delivery." ***Stirnweiss v. State of New York*, 2020 N.Y. Slip Op. 04986, Second Dept 9-16-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS NOT ACTING IN BAD FAITH IN SEEKING THE TESTIMONY OF CERTAIN WITNESSES; THE TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED; CONVICTIONS REVERSED.

The Second Department, reversing defendant's scheme to defraud conviction, determined defendant should not have been precluded from calling witnesses in good faith: " 'Pursuant to Penal Law § 155.15(1) [i]n any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith' ... . In this case, the defendant claimed that the money from the grant from OCFS [Office of Children & Family Service] was appropriated mistakenly but in good faith as reimbursement for expenses he personally paid for events occurring in 2008 and 2009, after the grant was awarded but in a time period not covered by the grant. The defendant intended to call as witnesses, a videographer who would attest to the fact that he 'got paid' for services at a 2009 event, and others who would testify as to other expenses at that event. ... The record does not establish that the defendant was acting in bad faith in seeking to present the testimony of these witnesses at the trial. The proposed testimony did not deal with a collateral issue ... , but, rather, went to the heart of the defendant's claim of right defense. Thus, it was error for the Supreme Court to have prospectively precluded the defendant's witnesses from testifying, and, under the facts of this case, that error cannot be deemed harmless." ***People v. Wills*, 2020 N.Y. Slip Op. 04976, Second Dept 9-16-20**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

THREE OF THE FOUR VEHICULAR HOMICIDE COUNTS WERE MULTIPLICITOUS EVEN THOUGH THEY INVOLVED DIFFERENT SUBDIVISIONS OF VEHICLE AND TRAFFIC LAW § 1192; THE DWI AND DWAI COUNTS WERE INCLUSORY CONCURRENT COUNTS OF VEHICULAR HOMICIDE SECOND DEGREE.

The Second Department determined three counts of vehicular homicide were multiplicitous and the DWI and DWAI counts were inclusory concurrent counts of vehicular homicide second degree: "While the People contend that each count of vehicular manslaughter required them to prove additional facts that the others did not, in fact, the People were only required to prove that the defendant violated one subdivision of Vehicle and Traffic Law § 1192 in order to prove his guilt under Penal Law § 125.12(1). The People's election to proceed on a theory that the defendant had violated more than one such subdivision by presenting evidence of his multiple, distinct manners of intoxication was not necessary to establish his guilt ... . Thus, a conviction on one count of vehicular manslaughter in the second degree would have been inconsistent with an acquittal on any other count charging the same offense predicated upon a different manner of intoxication ... . Accordingly, we agree with the defendant that counts 5, 6, and 7 of the indictment were multiplicitous of count 4 ... . Although the dismissal of the multiplicitous counts will not affect the duration of the defendant's sentence of imprisonment, it is nevertheless appropriate to dismiss these counts in consideration of the stigma attached to the redundant convictions ... . As the People concede, the defendant's convictions of driving while intoxicated in violation of subdivisions (2) and (3) of Vehicle and Traffic Law § 1192 and driving while ability impaired under subdivisions (4) and (4-a) of Vehicle and Traffic Law § 1192 are inclusory concurrent counts of vehicular manslaughter in the second degree ... . Accordingly, those convictions must also be reversed ...". ***People v. O'Brien*, 2020 N.Y. Slip Op. 04971, Second Dept 9-16-20**

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE, JUDGES.

DEFENDANTS' MOTION TO DISMISS CLAIMS NOT INCLUDED IN THE NOTICE OF CLAIM PROPERLY GRANTED; MOTION TO AMEND THE NOTICE OF CLAIM AND MOTION FOR LEAVE TO FILE A LATE NOTICE PROPERLY DENIED; JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE CLAIM FOR LOSS OF SERVICES BECAUSE THAT RELIEF WAS NOT REQUESTED.

The Second Department determined defendants' motion to dismiss claims that were not in the notice of claim was properly granted, and plaintiffs' motions to amend the notice of claim and for leave to file a late notice of claim were properly denied. The Second Department noted that the loss of services claim should not have been dismissed (sua sponte) because that relief was not requested. The action alleged negligent supervision by the school. Plaintiff student was allegedly pushed into a wall during gym class by another student who had been bullying her for some time: "The plaintiffs' new claims of other purported bullying incidents and Dupper's [plaintiff-student's father's] claim that he suffered stress, anxiety, and depression as a result of the ... incident constitute new theories of liability which were not included in the notice of claim and should be dismissed ... . The plaintiffs' proposed amendments to the notice of claim add substantive new facts and new theories of liability not set forth in the original notice of claim and which are not permitted as late filed amendments to a notice of claim under General Municipal Law § 50-e(6) ... . [T]he plaintiffs' failure to include a proposed notice of claim with their cross motion alone was a sufficient basis for denying that branch of the cross motion ...". ***C.D. v. Goshen Cent. Sch. Dist.*, 2020 N.Y. Slip Op. 04916, Second Dept 9-16-20**

FORECLOSURE, BANKRUPTCY, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE FACT THAT THE DEFENDANT IN THIS FORECLOSURE ACTION FILED FOR BANKRUPTCY DID NOT RELIEVE THE PLAINTIFF OF THE OBLIGATION TO COMPLY WITH THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the fact that defendant had filed for bankruptcy did not relieve the plaintiff in this foreclosure action from the obligation to comply with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304: "... [T]he plaintiff submitted, among other things, the affidavit of Kyle Lukas, a Senior Loan Analyst for ... the purported parent company of the plaintiff's loan servicer. Lukas averred that a 90-day notice was not required to be sent to the defendant pursuant to RPAPL 1304(3) due to the defendant's bankruptcy filing ... . In addition, while the plaintiff submitted, inter alia, copies of the note and mortgage, the pleadings, and the notice of default, it did not submit any documentation evidencing service of the 90-day notice required by RPAPL 1304. Contrary to the plaintiff's contention, the fact that the defendant previously filed for bankruptcy protection did not relieve the plaintiff of its obligation to send the RPAPL 1304 notice to her prior to commencing the action ... . Accordingly, since the plaintiff did not demonstrate its strict compliance with the statute, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike her answer, and for an order of reference, regardless of the sufficiency of the opposing papers ...". ***Mastr Adjustable Rate Mtges. Trust 2007-1 v. Joseph*, 2020 N.Y. Slip Op. 04935, Second Dept 9-16-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE STIPULATION OF DISCONTINUANCE DID NOT DEMONSTRATE THE MORTGAGE DEBT WAS DE-ACCELERATED WITHIN THE SIX-YEAR STATUTE OF LIMITATIONS PERIOD IN THIS FORECLOSURE ACTION; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

The Second Department determined plaintiff bank did not prove the debt had been acceleration and therefore did not demonstrate the foreclosure action was time-barred. It was not demonstrated that the stipulation of discontinuance affirmatively revoked the initial acceleration of the debt: " 'A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action' ... . Here, there is no evidence in the record of any affirmative act of revocation occurring during the six-year statute of limitations period following the initiation of the 2008 foreclosure action ... . The only evidence submitted by the plaintiff to establish its affirmative act of revocation was a printout of the Queens County Clerk Minutes, showing that a stipulation of discontinuance and a consent to cancel the lis pendens were filed in the 2008 foreclosure action on July 1, 2013. The plaintiff did not submit a copy of the stipulation of discontinuance. A stipulation of discontinuance will not, by itself, constitute an affirmative act of revocation where the stipulation is silent on the issue of the election to accelerate, and does not otherwise indicate that the plaintiff would accept installment payments from the defendant ...". ***Wells Fargo Bank, N.A. v. Hussain*, 2020 N.Y. Slip Op. 04997, Second Dept 9-16-20**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

ALTHOUGH THE MOTION TO VACATE THE JUDGMENT OF FORECLOSURE FOR LACK OF PERSONAL JURISDICTION WAS PROPERLY GRANTED FOR THE MOVING DEFENDANT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED THE SAME RELIEF TO DEFENDANTS WHO DID NOT SO MOVE.

The Second Department, reversing (modifying) Supreme Court, noted that the judge should not have, sua sponte, vacated the judgment of foreclosure as against those defendants who did not move for that relief: " 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . '[T]he defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served' ... . Here, Hickson was the only defendant who moved to vacate the judgment of foreclosure and sale and to dismiss the complaint for lack of personal jurisdiction. Accordingly, under the circumstances of this case, the Supreme Court had no basis to, sua sponte, vacate so much of the judgment of foreclosure and sale as was against the defendants other than Hickson and to direct the dismissal of the complaint insofar as asserted against those defendants for lack personal jurisdiction." ***Lehman Bros. Bank v. Hickson*, 2020 N.Y. Slip Op. 04932, Second Dept 9-16-20**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE DEFENDANT BANK'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE A MORTGAGE SHOULD HAVE BEEN GRANTED; THE BANK PROVED THE DE-ACCELERATION NOTICE WAS PROPERLY TRANSMITTED TO PLAINTIFF, RENDERING THE UNDERLYING FORECLOSURE ACTION TIMELY.

The Second Department, reversing Supreme Court in plaintiff's action to discharge and cancel a mortgage pursuant to RPAPL 1501(4), determined defendant bank demonstrated that the de-acceleration notice were properly transmitted to plaintiff, rendering the defendant bank's underlying foreclosure action timely: "Wells Fargo's vice president of loan documentation averred that she was familiar with the mailing practices for such notices; that Wells Fargo followed its practices in this instance; that it was Wells Fargo's practice to generate and mail such notices to borrowers on the date indicated on the notice; that Wells Fargo's practice also included keeping a copy of any notice in the corresponding mortgage loan file as a record that the notice was mailed; that the de-acceleration notice was sent on March 11, 2015, by both certified mail and regular mail to the property address and the plaintiff's address; and that a copy of the de-acceleration notice for each of the two addresses was in the plaintiff's loan file in accordance with Wells Fargo's mailing procedures. Contemporaneous business records were attached to the affidavit, showing that a de-acceleration letter was 'mailed to property address on 31115.' Through the submission of that evidence, Wells Fargo established that de-acceleration letters were, in fact, sent by regular mail in compliance with the expressed terms of the mortgage ... . The mailing procedures described in this case appear identical to those that this Court recognized as satisfactory in Pennymac Holdings, LLC v. Lane (171 AD3d 774, 775). Indeed, it is difficult to identify what additional evidence could be expected or required for Wells Fargo to demonstrate that it had transmitted the de-acceleration notice to the proper addresses by regular mail on the date indicated. The de-acceleration notice dated March 11, 2015, was mailed within six years from the debt acceleration occurring upon the commencement of the first action on March 24, 2009. Wells Fargo, in moving for summary judgment, therefore met its prima facie burden of establishing its entitlement to judgment as a matter of law dismissing the complaint ...". ***Assyag v. Wells Fargo Bank, N.A.*, 2020 N.Y. Slip Op. 04908, Second Dept 9-16-20**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF BANK DID NOT LAY A SUFFICIENT FOUNDATION FOR BUSINESS RECORDS SUBMITTED TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted because the evidence of compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 was insufficient: "The plaintiff in this mortgage foreclosure action, on its motion, inter alia, for summary judgment on the complaint ... failed to demonstrate, prima facie, its compliance with RPAPL 1304 because it failed to lay a proper foundation for the business records submitted as proof that the RPAPL 1304 notice was sent by first-class mail (see RPAPL 1304[2]; CPLR 4518[a]). In particular, the representative of the plaintiff who attempted to lay such a foundation failed to attest either that the records, which were created by a different entity, were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its business, or that she had personal knowledge of that entity's business practices and procedures ...". ***Wells Fargo Bank, N.A. v. Hirsch*, 2020 N.Y. Slip Op. 04996, Second Dept 9-16-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION IN THIS FALLING OBJECT CASE; DEFENDANTS DID NOT DEMONSTRATE THE JOB WAS NOT A HARD HAT JOB PRECLUDING DISMISSAL OF PLAINTIFF'S LABOR LAW § 241(6) CAUSE OF ACTION.

The Second Department, modifying Supreme Court, determined: (1) plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action stemming from his being struck by an unsecured heating duct during demolition; and (2) defendants (appellants) were not entitled to summary judgment dismissing the Labor Law § 241(6) cause of action premised on plaintiff's failure to wear a hard hat: "With respect to falling objects, liability is not limited to cases in which the falling object is in the process of being hoisted or secured ... . Rather, 'a plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute' ... . 'To succeed on a cause of action under Labor Law § 240(1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries' ... . The burden then shifts to the defendant to raise a triable issue of fact ... . A worker's comparative negligence is not a defense to a cause of action under Labor Law § 240(1) ... . Rather, only where the worker's own conduct is the sole proximate cause of the accident is recovery under Labor Law § 240(1) unavailable ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on his Labor Law § 240(1) cause of action insofar as asserted against the owner and the general contractor by submitting evidence that while he was engaged in demolition work, he was injured when an unsecured HVAC duct fell and hit him, causing him to fall to the ground ... . 'In order to prevail on a Labor Law § 241(6) cause of action premised upon a violation of 12 NYCRR 23-1.8(c)(1), the plaintiff must establish that the job was a hard hat job, and that the plaintiff's failure to wear a hard hat was a proximate cause of his injury' ... . Here, the appellants failed to establish, prima facie, that this was not a hard hat job, and that the plaintiff's lack of head protection did not play a role in the injuries he sustained when he was struck by the falling object." ***Aguilar v. Graham Terrace, LLC*, 2020 N.Y. Slip Op. 04906, Second Dept 9-16-20**

MUNICIPAL LAW, TOXIC TORTS, NEGLIGENCE, CIVIL PROCEDURE.

PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE CITY OF NEW YORK SHOULD NOT HAVE BEEN GRANTED IN THIS LEAD-PAINT EXPOSURE CASE; THE PLAINTIFF WAS EXPOSED TO LEAD IN AN APARTMENT OWNED BY THE NEW YORK CITY HOUSING AUTHORITY (NYCHA), AN ENTITY SEPARATE FROM THE CITY; THEREFORE THE UNDERLYING CLAIM WAS PATENTLY MERITLESS.

The Second Department, reversing Supreme Court, determined the motion for leave to file a late notice of claim in this lead-paint exposure case should not have been granted with respect to the defendant City of New York. Plaintiff alleged exposure to lead in an apartment owned by the New York City Housing Authority (NYCHA) which is a entity separate from the city: " 'Ordinarily, the courts will not delve into the merits of an action on an application for leave to serve and file a late notice of claim' ... . However, permission to file a late notice of claim is properly denied where the underlying claim is patently meritless' ... . Here, the Supreme Court should have denied the petition on the ground that the claim, insofar as asserted against the City, is patently meritless. 'Liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property' ... . It is undisputed that the apartment building in which the infant petitioner resided at the time of his injury was owned and operated by NYCHA, an entity which is separate from the City ... . Furthermore, there is no basis for finding that the City owed the infant petitioner a duty based upon a special relationship between them ...". ***Matter of K.G. v. City of New York*, 2020 N.Y. Slip Op. 04943, Second Dept 9-16-20**

PERSONAL INJURY, EVIDENCE.

QUESTION OF FACT WHETHER DEFENDANT PROPERTY OWNER HAD NOTICE OF THE ALLEGED ELEVATOR MISALIGNMENT PROBLEM WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the elevator was functioning properly and whether defendant had actual or constructive knowledge of the misalignment which alleged caused plaintiff's slip and fall: "... [T]he property defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing, through the deposition testimony of their witnesses and an expert affidavit, that no complaints were ever made about misalignment of the elevator, that routine inspections of the building by employees did not reveal the presence of such a condition, and that an inspection conducted of the elevator three days before the accident did not reveal any defects that would cause misalignment. ... [T]he plaintiff submitted, among other things, an affidavit from her mother, who then resided in the building, asserting that during the month preceding the accident, she observed misalignment of the elevator 'almost every day,' and that, in response to a complaint about misalignment by another resident, a member of the condominium's Board of Managers had acknowledged the problem in her presence ... . The plaintiff also submitted evidence demonstrating the documented occurrence of prior similar incidents of misalignment, and an unsatisfactory inspection report for the elevator, completed three days before the accident, which, according to the plaintiff's expert, and contrary to the averment of the property defendants' expert and other witnesses, evinced defects which would cause misalignment. The plaintiff's evidence was sufficient to raise a triable issue of fact as to whether the property defendants had notice of the

allegedly defective condition that caused the plaintiff's accident ...". ***Napolitano v. Jackson "78" Condominium*, 2020 N.Y. Slip Op. 04955, Second Dept 9-16-20**

THIRD DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW.

THE FAILURE TO COMPLY WITH THE SERVICE OF PROCESS REQUIREMENTS OF BUSINESS CORPORATION LAW § 307 IS A JURISDICTIONAL DEFECT AND THE FAILURE TO MAKE DILIGENT EFFORTS TO COMPLY WARRANTED DENIAL OF A MOTION TO EXTEND THE TIME FOR SERVICE PURSUANT TO BUSINESS CORPORATION LAW § 306-b.

The Third Department, reversing Supreme Court, determined plaintiffs' failure to make diligent efforts to serve defendant in accordance with Business Corporation Law § 307 required dismissal of the complaint: "... [B]ecause the failure to strictly comply with the procedures of Business Corporation Law § 307 constitutes a jurisdictional defect, rather than a mere irregularity, the 30-day time period in Business Corporation Law § 307 (c) (2) is not subject to extension under CPLR 2004 ... . * * * ... [P]laintiffs did not make reasonably diligent efforts to comply with the procedures of Business Corporation Law § 307. Although plaintiffs personally delivered the summons with notice to an authorized agent of the Secretary of State and sent a copy of the summons with notice by registered mail, return receipt requested, to the address that PLS had registered with the Bureau of Corporations and Charitable Organizations within Pennsylvania's Department of State ... , they made absolutely no effort to thereafter file the affidavit of compliance and the requisite accompanying documents ... . Moreover, the excuse provided for plaintiffs' failure to timely serve PLS in accordance with Business Corporation Law § 307 amounts to law office failure, an excuse that has been held to be insufficient to constitute good cause ... . Thus, as plaintiffs did not make the requisite showing, they are not entitled to an extension 'upon good cause' under CPLR 306-b." ***Garrow v. Pittsburgh Logistics Sys., Inc.*, 2020 N.Y. Slip Op. 05010, Third Dept 9-17-20**

CIVIL PROCEDURE, FORECLOSURE, ATTORNEYS.

LAW OFFICE FAILURE WARRANTED VACATING THE DISMISSAL OF THE FORECLOSURE ACTION STEMMING FROM PLAINTIFF BANK'S FAILURE TO APPEAR AT A SCHEDULED CONFERENCE.

The Third Department determined Supreme Court properly exercised its discretion and vacated the dismissal of this foreclosure action for plaintiff bank's failure to appear at a scheduled conference (22 N.Y.C.R.R. § 202.27): " '22 NYCRR 202.27 gives a court the discretion to dismiss an action where [a] plaintiff fails to appear at any scheduled call of a calendar or at any conference' ... . 'To vacate a dismissal under 22 NYCRR 202.27, it [is] incumbent upon [a] plaintiff to provide a reasonable excuse for his [or her] failure to appear and to demonstrate a potentially meritorious cause of action' ... . 'A motion to vacate a prior judgment or order is addressed to the court's sound discretion, subject to reversal only where there has been a clear abuse of that discretion' ... . Here, plaintiff's counsel explained that, due to a scheduling error, the assigned attorney actually appeared in court on the conference date but missed the calendar call. Law office failure may constitute a reasonable excuse for an appearance default ... Given the isolated nature of this nonappearance, we find that Supreme Court acted within its discretion in reconsidering and vacating the default dismissal ... . Notably, plaintiff supported its vacatur motion with a duly executed affidavit of merit from its representative. We further recognize that plaintiff has a meritorious cause of action, as we affirmed the award of summary judgment in plaintiff's favor ... . Under the circumstances presented, we conclude that the court acted within its discretion in granting the motion to vacate." ***Onewest Bank, F.S.B. v. Mazzone*, 2020 N.Y. Slip Op. 05011, Third Dept 9-17-20**

CIVIL RIGHTS LAW, FAMILY LAW.

MOTHER'S APPLICATION TO CHANGE THE CHILD'S NAME BY ADDING MOTHER'S LAST NAME TO FATHER'S LAST NAME (HYPHENATED) WAS PROPERLY GRANTED.

The Third Department determined mother's application to add her last name to the father's last name for the child (hyphenated) was properly granted. Mother and father are separated and mother has sole custody. Having both last names will facilitate dealing with the child's medical care: "Pursuant to Civil Rights Law article 6, an application to change a child's name shall be granted as long as the court is satisfied that the petition is true, there is no reasonable objection to the proposed name change by the opposing party and the child's interests will be substantially promoted by the change (see Civil Rights Law § 63 ...). The evidence at the hearing demonstrated that the mother is the primary legal and physical custodian of the child, with the father having parenting time with the child every other weekend for a four-hour time period. The mother testified that the child suffers from a medical condition that requires frequent visits with medical providers and, because she does not presently share her surname with the child, this fact regularly presents confusion and difficultly when dealing not only with the child's medical and insurance providers, but also with the child's school, pharmacy and the various foundations where she has applied for grants pertaining to the child's diagnosis. Moreover, the child recently started kindergarten, is 'very curious' and has asked the mother numerous questions regarding his family, indicating a preference for his name

to reflect both the mother's and father's family names. To that end, the mother indicated that she is not seeking to eliminate the father's surname, but simply to add her surname to create a hyphenated last name that includes both the mother's and the father's surnames." ***Matter of Noah ZZ. (Amanda YY.--Ramon ZZ.)*, 2020 N.Y. Slip Op. 05007, Third Dept 9-17-20**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, ADMINISTRATIVE LAW.

THE STATE DIVISION OF HUMAN RIGHTS (SDHR) ADMITTED IT HAD FAILED TO ADEQUATELY INVESTIGATE PETITIONER'S GENDER DISCRIMINATION CLAIMS; REVERSING SUPREME COURT, SDHR'S "NO PROBABLE CAUSE" FINDING WAS ANNULLED AND THE MATTER REMITTED.

The Third Department, reversing Supreme Court, determined the State Division of Human Rights (SDHR) had acted irrationally, arbitrarily and capriciously in finding there was no probable cause to believe petitioner's gender-discrimination claims: "In its answer, SDHR specifically requested that Supreme Court remand this case so that SDHR could conduct further investigation pursuant to 9 NYCRR 465.20 (a) (2), conceding that it 'may have overlooked or not given full consideration' to the issues raised by petitioner. SDHR acknowledged that the final investigation and report ... erroneously included information from a wholly unrelated case before it ... and conceded that the witnesses identified by petitioner 'were not interviewed [by SDHR] during the investigative process.'... Given SDHR's admissions, Supreme Court was presented with sufficient good cause demonstrating that SDHR's underlying investigation in this matter was inadequate and/or abbreviated (see 9 NYCRR 465.20 [a] [2]). Accordingly, we find that SDHR's probable cause determination based thereon should be annulled as irrational, arbitrary and capricious, and this matter remitted to SDHR for further investigation 'so that there can be a proper determination as to whether probable cause exists' ...". ***Matter of Schwindt v. Niagara Mohawk Power Corp.*, 2020 N.Y. Slip Op. 05009, Third Dept 9-17-20**

PERSONAL INJURY, EVIDENCE.

THE AFFIDAVIT FROM PLAINTIFF'S ACCIDENT RECONSTRUCTION EXPERT WAS ESSENTIALLY THE SOLE BASIS FOR PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS BICYCLE-CAR ACCIDENT CASE; THE AFFIDAVIT, FOR SEVERAL REASONS, DID NOT RISE TO THE LEVEL OF PROOF REQUIRED TO WARRANT SUMMARY JUDGMENT.

The Third Department determined plaintiff's motion for summary judgment in this bicycle-car accident case, based entirely on the affidavit from plaintiff's accident reconstruction expert (Witte), was properly denied. The bicyclist died in the accident. The driver, Amyot, and her husband, a passenger, died later: "... [W]e note that Witte does not aver that his opinion is within a reasonable degree of scientific certainty. Although the failure to do so does not de facto render his affidavit invalid ... , the affidavit must contain an evidentiary foundation that would support plaintiff's verdict if offered at trial ... . This it failed to do. Witte's conclusions — which were based on the timing of the accident, i.e., where Amyot should have seen decedent and the precise distances and times averred to by Witte — are not based on facts evident in the record, but rather on the statement that Amyot's husband made to police that '[a] couple houses past [the] speed zone on the right, I saw [decedent] on his bike coming out of . . . the driveway.' It is unclear from this statement whether Amyot's husband was located 'a couple' of houses past the speed zone when he saw decedent or whether decedent and the driveway from which he was exiting were located 'a couple' of houses past the speed zone. Further, one cannot discern what constitutes 'a couple.' For these reasons, the factual foundation lacks the probative force adequate to support summary judgment ... . [A]part from the supporting depositions, all of the documents that Witte utilized in forming his opinion are unsworn, uncertified and/or unauthenticated. Although the professional reliability exception to the hearsay rule allows 'an expert witness to provide opinion evidence based on otherwise inadmissible hearsay,' it must be shown 'to be the type of material commonly relied on in the profession' ... . Furthermore, even if such reliability is shown, 'it may not be the sole basis for the expert's opinion' ...". ***Delosh v. Amyot*, 2020 N.Y. Slip Op. 05003, Third Dept 9-17-20**

PISTOL PERMITS, ADMINISTRATIVE LAW.

PETITIONER'S PISTOL PERMIT WAS NOT REVOKED FOR DOMESTIC VIOLENCE; THEREFORE THE FACT THAT THE PERMIT HAD BEEN REVOKED IN THE PAST, STANDING ALONE, WAS NOT "GOOD CAUSE" FOR DENIAL OF THE INSTANT PETITION FOR REINSTATEMENT OF THE PERMIT; MATTER REMITTED.

The Third Department, reversing County Court, determined petitioner's application for reinstatement of his pistol permit should not have been denied simply on the ground it had been revoked before. The matter was remitted: "... [P]etitioner's application was erroneously denied on the sole ground that his pistol permit had previously been revoked. Although '[a] pistol licensing officer has broad discretion in ruling on permit applications,' denials must be based upon 'good cause' ... . Penal Law § 400.00 (1) (k) prohibits the issuance of a pistol permit to an individual 'who has . . . had a license revoked or who is . . . under a suspension or ineligibility order issued pursuant to the provisions of [CPL 530.14] or [Family Ct Act § 842-a].' This Penal Law statute, however, 'was intended to protect victims of domestic violence from individuals who have orders of protection issued against them' and, thus, necessarily bars issuance only where the prior pistol permit was revoked pursuant to one of the cited statutes ... . Here, petitioner's prior permit was not revoked pursuant to either CPL 530.14 or

Family Ct Act § 842-a, but instead upon proof that petitioner made a certain threatening remark and failed to comply with an order directing him to turn in all of his firearms. 'Although the revocation of petitioner's pistol permit and the reasons therefor unquestionably could have some bearing on whether there is good cause to deny his current application,' the prior revocation, alone, was not an adequate basis for the denial (id. at 1114 [internal quotation marks and citation omitted]). As the determination set forth no other ground for denying the permit, it was not based on 'good cause' and must be annulled as arbitrary and capricious ...". ***Matter of Gaul v. Sober*, 2020 N.Y. Slip Op. 05013, Third Dept 9-17-20**

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), RELIGION.

THE 1896 DEED FROM THE PLAINTIFF WHICH TRANSFERRED THE PROPERTY TO DEFENDANT DIOCESE WITH THE LIMITATION THAT IT BE USED AS A CHURCH CREATED A POSSIBILITY OF REVERTER WHICH TRANSFERRED THE PROPERTY BACK TO THE PLAINTIFF WHEN THE PROPERTY STOPPED BEING USED AS A CHURCH IN 2015.

The Third Department, reversing Supreme Court, determined the 1896 deed to defendant Catholic diocese, which limited the use of the property to serving as a church, conveyed a fee on limitation with a possibility of reverter, which transferred the property to back to plaintiff when the diocese stopped using the property as a church in 2015: "As plaintiff still held a possibility of reverter, resolution of the RPAPL article 15 action hinges upon whether defendant violated the limitation restricting the use of the property to church purposes. The parties' joint stipulation of facts includes the 2015 decree from the Bishop of Ogdensburg that relegated the church 'to profane but not sordid use,' and indicated that parishioners would be served by a nearby parish. ... The stained-glass windows and the altar were later removed, leaving only the pews. Under the canon law of the Roman Catholic Church, 'if a church cannot be used in any way for divine worship and there is no possibility of repairing it,' it can be relegated to profane but not sordid use ... . 'Profane use means use for purposes other than a Roman Catholic worship service,' and 'sordid' limits that use, prohibiting any use that is disrespectful to the Catholic Church … . Contrary to defendant's contentions, we find that defendant's use of the property for church purposes ceased pursuant to the 2015 decree, thus violating the limitation in the 1896 deed. Accordingly, it reverted to plaintiff, which now owns the property in fee simple." ***Paul Smith's Coll. of Arts & Sciences v. Roman Catholic Diocese of Ogdensburg*, 2020 N.Y. Slip Op. 05012, Third Dept 9-17-20**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.